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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1983

FRANK KUSTINA,

*Appellant,*

v.

THE CITY OF SEATTLE,  
and THE HISTORIC SEATTLE PRESERVATION  
and DEVELOPMENT AUTHORITY,

*Appellees.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRANK KUSTINA  
5201 Ballard Ave N.W.  
Seattle, WA 98107  
206-789-2155

*Appellant Pro se*

## QUESTIONS PRESENTED

1. Did the procedure whereby a certificate of approval was issued for siting and remodeling the houses moved into the landmark commercially zoned district patently, clearly and irrefutably demonstrate the absence of notice and opportunity to be heard required by courts as a matter of constitutional necessity?

2. Does RCW 42.30.060 (commonly referred to as the Washington State Open Meetings Act) withdraw from the courts of the State of Washington the jurisdiction, authority and power to give effect to facts used and relied upon in making the underlying judgment involving the September 14, 1976 ratification herein in question?

3. Did the lower federal courts err in holding that the doctrine of res judicata precluded litigation of twelve of the fifteen claims?

4. Did the District Court have original jurisdiction to provide a remedy for the constitutional deprivations alleged in the first eleven claims and claim fifteen of the complaint?

5. Is the imposition and or time of demand for and collection of filing fees in the Washington State courts, a condition precedent to access and action upon a lawsuit, appeal, or review involving alleged deprivation of state or federal constitutional guarantees, unconstitutional as violative of petition, due process and equal protection guarantees in Art. 1, sections 2, 3, 4, and 32 of the Constitution of Washington and the First, Fifth and Fourteenth Amendments to the United States Constitution?\*

6. Is the imposition and or time of demand for the collection of filing fees in the federal courts below and this Court, a condition precedent to acting upon a lawsuit, appeal, or petition for a writ of certiorari involving alleged deprivation of federal constitutional guarantees, unconstitutional as violative of petition, due process and equal protection guarantees in the First and Fifth Amendments to the United States Constitution?\*

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\* 28 U.S.C. 2403(a)(b) may be applicable. The Solicitor General and Washington Attorney General have been served with a copy of this petition.

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**OPINIONS BELOW**

The opinions of the King County, Washington Superior Court, The Court of Appeals of the State of Washington, United States District Court for Western Washington at Seattle Orders dated August 11, 1980, June 10, 1981, December 10, 1981, October 1, 1982, November 24, 1982 and Ninth Circuit Court Orders dated December 14, 1983 and denial of rehearing dated February 2, 1984 are reproduced in the Appendix.

## JURISDICTION

The statutory basis for federal jurisdiction of this civil case in the District Court is 28 U.S.C. 1343(1)(2)(3)(4), 42 U.S.C. 1983 and 42 U.S.C. 1985. This petition is being docketed in this Court within 60 days from the denial of rehearing below dated February 2, 1984 of the Memorandum dated December 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS AND RULES

### Article IV, United States Constitution:

Sec. 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

### First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### Fifth Amendment, United States Constitution:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

### Fourteenth Amendment, United States Constitution:

Sec. 1 . . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Revised Code of Washington (RCW) 42.30.010: (Open Public Meetings Act)

42.30.010 Legislative declaration. The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. (1971 ex c.c. 250 sec. 1)

Revised Code of Washington (RCW) 42.30.040: (Open Public Meetings Act)

42.30.040 Conditions to attendance not to be required. A member of the public shall not be required, as a condition to attendance at a meeting of a governing body, to register his name and other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his attendance. (1971 ex.s. c 250 sec. 4)

Revised Code of Washington(RCW) 42.30.060: (Open Public Meetings Act)

4.30.060 Ordinances, rules, resolutions, regulations, etc., to be adopted at public meetings—Notice. No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this section shall be null and void.

#### Legislative History

Added by Laws 1st Ex Sess 1971 ch 250 sec. 6.

28 U.S.C. 1254, 1343, 1911, 1913, 1914 reproduced in Appendix. 28 U.S.C. 1738. State and Territorial-statutes and judicial proceedings; full faith and credit



The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. 1739. State and Territorial nonjudicial records; full faith and credit

All nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other State, Territory or Possession by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it

shall be under the great seal of the State, Territory, or Possession in which it is made.

Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken.

42 U.S.C. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1985 reproduced in Appendix

16 U.S.C. 470(Public Law 89-665 as amended by Public Laws 91-243, 93-95, 94-422, 94-458, 96-199, 96-244, and 96-515) cited as the "National Historic Preservation Act" is reproduced in the appendix hereto.

Seattle Ordinance 105462 creating the Ballard Avenue Landmark District is reproduced in the appendix hereto.

ByLaws and Procedures for the Ballard Avenue Landmarks Board is reproduced in the appendix hereto.

### **STATEMENT OF THE CASE**

The matter in dispute in the first eleven claims and in the reasoning in part dismissing claim fifteen centers around issuance of a certificate of approval and a building permit for the siting and relocation of two wooden houses into the Ballard Avenue Landmark District in Seattle, Washington. Seattle Ordinance 105462 creating the Ballard Avenue Landmark District in section 5 titled "Approval of changes to buildings, structures and other visible property within Ballard Avenue Landmark District" sets out the procedure for issuance of a certificate of approval.

Appellant filed suit on August 23, 1977 in King County, Washington Superior Court at Seattle to abate as a nuisance the structure(s) sited and remodeled in the landmark district

pursuant to a procedure spelled out by Washington State statutes and used and followed by King County Superior Court in other cases. At a summary judgment proceeding the King County Superior Court dismissed the case with prejudice. The Superior Court Judge found that appellant failed to set forth any claim upon which relief could be granted, that there was no issue of material fact and that plaintiff's action was brought beyond the twenty day time required by law. It also found that appellant had not alleged, identified or sustained any legal injury, was not aggrieved and lacked standing, and that his claims predicated on Seattle Ordinance 105462 were without merit as a matter of law. The Washington State Court of Appeals affirmed the dismissal. The Washington State Supreme Court denied appellant's petition for review.

Appellant unsuccessfully sought to challenge the appellee's issuance of a certificate of approval and subsequent building permit for siting and remodeling the two houses brought into the district as violative of his constitutional rights and Seattle Ordinance 105462 section 5(a) issuance mandate "... except pursuant to a Certificate of Approval issued by the Director pursuant to this ordinance". It should be kept in mind that under the ordinance such issuance by the Director is solely and only a clerical act and not quasi-legislative or quasi-judicial. That limitation appellant contends was not recognized by the courts of the State of Washington. Ordinance 105462 section 5(c) grants jurisdiction or the opportunity to act first on "all" such applications for a certificate of approval to "the District Board or the Landmarks Preservation Board". Due to alleged misconduct by appellee, which amounted to flagrant and unlawful abuse of power, neither of those Boards considered the application in accordance with the specific ordinance wording and procedures spelled out in the ordinance for the consideration of "all" applications. Instead, as appellant alleged in his state complaint, the Director of the Seattle Department of Community Development usurped the ordinance language for processing of "all" applications and took it upon himself to without prior notice decide upon and sign a certificate of approval on June 3, 1976.

Appellant contended from the legislative history of Seattle Ordinance 105462 and the text of section 5(d) of that ordinance that the Director has only a clerical role under the ordinance since he or she is directed what and when to do things, and he or she lacks authority to unilaterally decide anything under the ordinance. The ordinance was enacted to specifically take any such power away from a City Hall official that might be exercised under other local historic preservation ordinances and place it in the local district board. The record evidences the correctness of appellant's position and understanding (See Exhibits A-F attached to District Court Docket Entry #19). In spite of the law and the fact, the Washington State Court of Appeals found the above procedure by the Director, "even assuming the validity of plaintiff's claim", was improper and none-the-less ratified by the Ballard Avenue Landmark District Board's "endorsement" subsequently on September 14, 1976 of the June 3, 1976 signing (See Docket Entry 7 Exhibit A attached to Affidavit of John Turnbull). Appellant received no notice of the September 14th meeting or consideration of a certificate of approval for siting the houses as an agenda item of that meeting either. Such defect is pivotal to resolution of this appeal. The absence of such notice and or agenda if any exists of the June 3 and September 14 action upon the certificate of approval and the absence of the opportunity for appellant to speak at a public meeting and hear what others have to say and respond to what is said as part of the dialog as well as observe the action of the board is the 42 U.S.C. 1983 violation addressed in the federal complaint, and to which this appeal is directed.

Such occurrence takes on added significance and meaning when it is recalled that appellant signed a petition directed to the Director to convene a board meeting to consider the application. The petition was signed, delivered, and accepted in July 1976. Appellee thereafter improperly took steps to bring about or defeat board consideration.

Notice should also be taken by the Court of the September 14th minutes which appellee presented as conclusive of the granting of a certificate of approval, and which the state courts agreed in ruling that such made the matter "moot". Yet those

minutes are devoid, for a reason other than a clerical error, of any mention at the September 14th meeting of discussion evidencing any views questioning the siting. Such is evidence of a patent defect in the siting process since some of those signators, including appellant, to the petition requesting that the board, rather than the Director, be convened to consider the application could have been expected to express their views or question at the ordinance specified public meeting such action. Is the explanation for the absence of such opposing views or questioning due to the fact that others too had no prior notice of any consideration at the September 14th meeting on an application for a certificate of approval for the houses or that such consideration was on the agenda? The answer as to why no notice was given as required by Ordinance 105462 is, as will be discussed hereinafter, because the matter came up for final consideration under New Business which is irrefutable proof of a procedural defect statutorily prohibited and mandated as void and of no effect under the Washington State Open Meetings Act (RCW 42.30.060), Seattle Ordinance 105462, and the ByLaws and Procedures for the Ballard Avenue Landmarks Board.

In the state complaint under both Factual Allegations and Claim Allegations and the federal complaint at page 2 paragraphs 5, 6, and 7 appellant clearly indicates lack of statutorily required prior notice of public hearings on applications for a certificate of approval involving the subject houses. The claims in question allege facts involving First, Fifth and Fourteenth Amendment deprivations.

The federal constitutional claims presented to the District Court via the complaint and by a motion for reconsideration and were reiterated before the Ninth Circuit Court of Appeals when argued and submitted on November 9, 1983. That Court affirmed the district court's holding that the doctrine of res judicata precludes litigation of claims one through eleven and fifteen.

## REASONS FOR GRANTING THE WRIT

The underlying state court judgment sanctioning the procedure whereby a certificate of approval was issued for siting and remodeling the houses moved into the landmark commercially zoned district patently, clearly and irrefutably demonstrates from the record the absence of notice and opportunity to be heard required by courts as a matter of constitutional necessity.

From the inception of his suits, as evidenced by his complaints, appellant has steadfastly maintained that he never received notice required for "all" applications under Seattle Ordinance 105462 including the certificate of approval application in question. Even though the record does not contain any evidence of required notice, the state courts found ratification at the September 14th meeting as evidenced solely by the Minutes offered by the City (District Court Docket Entry 7 Exhibit A to the Affidavit of John Turnbull). How can action such as that taken in the Minutes of September 14, 1976 regarding the houses summarily constitute prior notice required under Seattle Ordinance 105462? The action taken and here relevant in the Minutes is mandated to be void under RCW 42.30.060 (commonly referred to as the Washington State Open Meetings Act) because the action came up for final action under New Business which by parliamentary definition and procedure is action taken without prior notice. The fact that the final action was taken on the certificate of approval application in the Minutes of September 14 under New Business constitutes admitted proof by the City in the record that appellant, as he has claimed throughout never had nor could have had notice required by Seattle Ordinance 105462.

Furthermore, because appellant signed a petition delivered in July 1976 to and accepted by the Director of the Seattle Department of Community Development requesting that the district board be convened to consider the application for a certificate of approval as required by Ordinance 105462, it is believed that a court should insist that appellant receive personal notice of action on the certificate of approval in question prior to the September 14, 1976 board meeting.

Appellant did not receive such or have any prior knowledge or notice of the June 3rd or September 14th consideration and or action upon the application for a certificate of approval in question.

The failure to follow the notice specifics of Seattle Ordinance 105462 not only invalidates the legal process leading to the issuance of the certificate of approval, but such failure mandates the September 14th action of ratification void under RCW 42.30.060. RCW 42.30.060 title "Ordinances, rules, resolutions, regulations, etc., to be adopted at public meetings—Notice" concludes "Any action taken at meetings failing to comply with the provisions of this section shall be *null and void*" (emphasis supplied). As will be shown below by the local district ByLaws—"2. All meetings of the Board shall be held in accordance with the Open Meetings Act of 1971 WRC sec. 42.30)".

Washington State case law as evidenced by the Washington State Supreme Court's holding in *Eastlake Coun. v. Roanoke Assoc.*, 82 Wn 2d 475, 513 P2d 36(1973) involving misconduct by the City of Seattle does not allow for curing such defect as here done by finding "ratification".

The underlying judgment upon which the res judicata ruling is based is void. The ratification and mootness finding of the Washington State Appeals Court is not in compliance with jurisdictional conditions imposed under RCW 42.30.060 and Seattle Ordinance 105462 regarding facts taken and given effect from the September 14th meeting. Judicial enforcement of administrative decisions regarding the validity of the certificate of approval for siting and remodeling the houses in question is prohibited by mandate of law because to do so is to give effect to that which by statute is declared null and void.

Any full faith and credit constraint thought to exist by the federal courts below under Article IV or 28 U.S.C. 1738 is negated by the absence of a valid state judgment upon which res judicata depends. (See *ALPA v. TI*, 567 F. Supp. 66 headnote 7 at pp. 72-3).

Title 28 U.S.C. 1738 can not be said to diminish a federal court's inherent power to review procedural compliance with



RCW 42.30.060, Seattle Ordinance 105462 and the ByLaws of that ordinance. Before applying res judicata it is incumbent for the federal court to inquire into the legality of any judgment or process by which judgment was obtained. A valid judgment is a prerequisite for res judicata. In addition, it is also incumbent, as appellant maintains did not here occur, to apply 28 U.S.C. 1738 correctly and legally. "Acts" (statutes and ordinances) are included in 28 U.S.C. 1738.

By overlooking, disregarding or failing to address RCW 42.30.060 as the controlling preclusion rule in the State of Washington the Circuit Court by its Memorandum has destroyed the purpose and provisions of RCW 42.30.060 herein relevant. By disregarding, not recognizing, addressing or extending full faith and credit to RCW 42.30.060 as required by Article IV, 28 U.S.C. 1738, and followed in 28 U.S.C. 1739 the Circuit Court has in effect overruled the validity and protections of RCW 42.30.060 as applied solely to appellant, but to no other person in the State of Washington. That raises an equal protection question under 28 U.S.C. 1738 application here.

The lower courts by their judgments have substituted their judgment regarding jurisdiction to render the underlying judgment which incorporates and gives effect to facts mandated as void under RCW 42.30.060 for that of the Washington State Legislature which enacted as substantive law RCW 42.30.060. The lower courts have created their own jurisdiction to render and or give effect to a Judgment where such is withdrawn from Washington State Courts and mandated null and void under RCW 42.30.060.

The state courts statutorily lacked the authority to render a decision of ratification and mootness based upon the evidence presented and relied upon. Ratification of a void act has no legal effect (See 16 C.J.S. secs. 422 and 428). Appellant never, as the record evidences by the Minutes, received required notice of action upon the application for the certificate of approval in question and no admissible evidence of notice exists in the record. How can recognition of the underlying state court



judgment shown to be void under Washington State Law be legally enforced by a federal court?

Seattle Ordinance 105462 sec. 4(b) specifies:

(b) *The District Board shall elect its own chairman and adopt in accordance with the Administrative Code (Ordinance 102228) such rules of procedure as shall be necessary in the conduct of its business, including (i) a code of ethics, (ii) rules for reasonable notification of public hearings on applications for certificates of approval and applications for permits requiring certificates of approval in accordance with Section 5 hereof, . . . (emphasis supplied).*

Though the certificate of approval in question was signed on June 3, 1976 and the so-called ratification is said to have occurred on September 14, 1976 it was not until May 4, 1978 that ByLaws and Procedures for the Ballard Avenue Landmarks Board were adopted and filed with the City Comptroller on May 23, 1978.

The text of the ByLaws and Procedures is part of the record below and is reproduced in part here and fully in the Appendix. It clearly shows the appearance of merit in appellant's position. Prior absence of the ByLaws is relevant.

**ByLaws and Procedures for the Ballard  
Avenue Landmarks Board  
(Adopted at a Public Hearing on May 4, 1978)**

**Bylaws**

1. The Board derives its authority and purpose from Seattle Ordinance 105462 (hereinafter referred to as the Ordinance) and is subject to the requirements of the Seattle Administrative Code.

2. All meetings of the Board shall be held in accordance with the Open Public Meetings Act of 1971 (WCR § 42.30).

3. Meetings of the Board shall be regularly held on the first Thursday of every month at 5:15 p.m. unless cancelled with the approval of the Chairperson. Additional meetings of the

Board shall be held upon the call of the Chairperson or at the request of three members of the Board.

4. The date, time, location and agenda for all meetings shall be released to local papers and posted at least five days in advance at the Ballard Community Service Center as well as the vicinity of the northern and southern boundaries of the District.

5. The Board shall elect a Chairperson and a Vice Chairperson each July for one-year terms.

6. Conduct of meetings shall be governed by *Robert's Rules of Order*.

7. A quorum for the conduct of any meeting of the Board shall be a majority of the current members of the Board.

8. A majority vote of Board members shall be required to approve an action of the Board. In case of a tie vote, the motion shall fail.

9. The Chairperson shall vote as any member of the Board.

10. The discussion on each application for a Certificate of Approval (hereinafter referred to as an Application) shall be preceded with a staff report unless waived by the Board. The staff report shall include any comments on the Application received by Board members not present, as well as a summary of past actions related to the Application and a report on how the proposed changes relate to the Guidelines for the District and National Register properties.

11. During the review of an Application the presiding officer shall solicit testimony both in favor and in opposition to the Application.

12. Before a vote is taken on an Application, the presiding officer shall ask if all members in attendance are informed of the matter of the vote and may poll each member for his or her opinion on the matter. A member may abstain from voting only if that member declares that there is a conflict of interest in their voting.

13. Voting shall be by show of hands and shall be recorded in the minutes.

14. There shall not be vote by proxy.

15. The action taken by the Board on an Application shall not be incompatible with the criteria established by both the District Guidelines and the Guidelines for Properties on the National Register as noted in the context of testimony presented at the meeting.

16. Items not listed on the formal agenda shall be discussed under New Business, however formal action on an Application shall not be made under New Business.

17. Committees established by the Board may include non-members, but committees may not act in lieu of official Board action.

18. In case of a conflict between these Bylaws and *Roberts Rules of Order*, these Bylaws shall take precedence.

## **Procedures**

### **Staffing**

Staffing of the Board shall be provided in accordance with Ordinance 105462 of the City of Seattle.

### **Offices and Information**

Information concerning official business of the Board, Rules, Procedures and Guidelines may be obtained from the Ballard Community Service Center (5349 Ballard Avenue N.W., Seattle, Wa. 98107), or from the Board offices at the City of Seattle, Department of Community Development (400 Yesler Way, Seattle, Wa. 98104 625-4501).

Applicants are encouraged to consult informally with the Board staff prior to submittal of an application for a Certificate of Approval.

### Processing of Applications

Applications for Certificates of Approval required under Ordinance 105462 shall be made by contacting the Board staff and filling out the application form. There shall be sufficient information to provide the Board with adequate materials for review and action. Such information may include scale drawings, color samples, a completed application for a Building Permit, and material samples.

Application blanks may be obtained from the Ballard Community Service Center or the Board offices.

Completed applications will be entered on the agenda for the next regular meeting allowing for reasonable notification of a public meeting.

The Court's attention is directed to paragraphs 1, 2, 4, 6, 11, 16 and the last sentence of the text reproduced above. Specific attention is directed to paragraph 16 as supportive of appellant's position and pivotal if not determinative of this appeal.

The Circuit Court at page 3 of its Memorandum cites the law of *Federated Department Stores v. Moitie*, 452 U.S. 394, 398 (1981) as determinative of the preclusion rules of the State of Washington. The sentence quoted speaks to a "wrong" judgment. RCW 42.30.060 precludes a judgmental decision, right or wrong, such as that cited in the Federated case since the relevant controlling provision of RCW 42.30.060 deprives the state court from rendering the underlying judgment pleaded because the state court did not have jurisdiction of the subject matter of action taken regarding the certificate of approval at the September 14th meeting under RCW 42.30.060 and Seattle Ordinance 105462 since the September 14th meeting failed to comply with the notice provisions of RCW 42.30.060, Seattle Ordinance 105462 and the ByLaws and Procedures for the Ballard Avenue Landmarks Board (See Wa AGO 1971 No. 33 page 31 in Appendix).

An "erroneous conclusion" such as that in Federated at page 399 or an "erroneous view" was also impossible here since

no conclusion or view could be reached giving effect under RCW 42.30.060 as here occurred to that which is statutorily declared void by RCW 42.30.060.

The state court statutorily lacked the authority or jurisdiction under RCW 42.30.060 to render a judgment giving effect to relevant action taken at the September 14th meeting.

The federal courts fall into the same trap that the state courts did because the federal courts too fail to give full faith and credit to state substantive law RCW 42.30.060 which mandates the state judgment void because it gives effect and recognizes the September 14th meeting action declared void under RCW 42.30.060 (the Washington State Open Meetings Act).

Appellant fails to understand how that which is mandated substantively void can be resurrected, and the controlling statute disregarded. Absent lawful curing, which did not legally occur here, that which is void is void forever under the laws of the State of Washington (See *Eastlake Coun v. Roanoke Assoc.*, 82 Wn 2d 475, 513 P2d 36(1973)).

The federal courts lack jurisdiction to give effect to the state judgment because RCW 42.30.060 as the substantive law of the State of Washington denies to a state court jurisdiction to render a judgment violative of RCW 42.30.060. Any such jurisdiction to render judgment here under Washington State law is prohibited and statutorily declared void. Had the Washington State Legislature in enacting RCW 42.30.060 wanted prohibited action to be voidable it would have said so, but by its language it clearly did not, and knowingly, deliberately, and emphatically used and meant "void".

The lower federal courts rule on the meaning and or applicability of the substantive law of Washington State (RCW 42.30.060) in the first instance. The original forum has not determined the meaning and or applicability of the substantive law to the underlying state judgment as appellant reads the record.

The adequacy of the public hearing process involved in granting the certificate of approval is so patently procedurally

deficient as not to be recognized by a federal court in the wake of this Court's holding in the landmark historic preservation case, *Penn Central Transportation Co et. al v. New York City et al.*, 98 C Ct 2646, 438 US 104, 57 L Ed 2d 631(1978). As appellant reads the Penn Central case he comes away with the understanding that historic preservation legislation regarding a landmark district, site, or structure in New York City was reasonable and did not infringe upon constitutional guarantees because of the extent and degree of prior public participation in the designation therein involved. A substantial question is presented by the instant case which should be settled by this Court. Does public involvement and participation cease upon designation of a landmark district, site or structure? Appellant believes this Court would emphatically say "No", and insist upon continued public participation where called for and or allowed as the land use and historic preservation planning process evolves and unfolds as here via consideration and action upon the certificate of approval application for the houses here in question. Without notice, as here occurred, the standard of public involvement and participation believed required by this Court in *Penn Central*, supra, is not and can not continue to be met.

In addition, the failure by the City to provide notice and an opportunity to be heard at a public hearing such as that of September 14, 1976 impedes and defeats the purpose of the Act and Declaration of Congressional policy of the National Historic Preservation Act of 1966 (PL 89-665; 16 U.S.C. 470 as amended). Local historic preservation legislation such as Seattle Ordinance 105462 was enacted in furtherance of the National Historic Preservation Act.

The total absence of notice to appellant and appearance of the absence of testimony in opposition to the application allowed under paragraph 11 of the district ByLaws, as shown above, appears to not even reach the first rung of public participation. The procedure for consideration of the application for a certificate of approval at the September 14th meeting from the Minutes, aside from appellant's contention that such is statutorily void, was a sham. The facts alleged in the complaint depict just such a circumstance. The siting of the

houses into the district was a fait accompli. Other Seattle historic or special review districts were afforded the opportunity and procedures whereby they turned the siting of the houses down in their districts. The Ballard Avenue Landmark District was denied that opportunity and procedure guaranteed by and in accordance with Seattle Ordinance 105462. The houses' presence in the district was by fiat. The City flagrantly and unlawfully abused its power and disregarded the law. From the outset the City and Historic Seattle secretly embarked upon a scheme to dump the houses, unwanted by other historic or special review districts, in the Ballard Avenue Landmark District. The houses have no historical connection with the district. The houses were not legally protected as the historic district was under Seattle Ordinance 105462. The City clearly did what it wanted, law or no law.

RCW 42.30.010 Legislative declaration to Chapter 42.30 Open Public Meetings Act states:

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Appellant's understanding of that declaration carries with it the right, denied appellant, to observe the ratification action said to have occurred at the September 14th meeting. The City failed to follow the specifics of law to validate the legal process here involved, absent notice, the opportunity to be heard and procedural compliance, i.e., the ByLaws, in acting upon the application for the certificate of approval in question.

By the enactment of Chapter 42.30 the Washington State Legislature has statutorily declared as policy with the force of law strict compliance and adherence with rules of procedure and conduct of the people's business by boards such as the district board here. The consequence of failure to abide by the Open Public Meetings Act is clear as shown by RCW 42.30.060.



Any notion, as the City has maintained in court, that appellant freely chose the state court as the forum to hear his federal constitutional claims, and that he is stuck with that choice loses sight of the fact that the state suit was filed prior to *Monell et al v. Dept of Soc'l Svcs of NYC*, 98 S Ct 2018(1978). Appellant had no choice but to submit the question of deprivation of First, Fifth and Fourteenth Amendment constitutional guarantees to a state court because prior to *Monell* the City was not a "person" for the purposes of federal court jurisdiction for a 42 U.S.C. 1983 claim. The fact that 42 U.S.C. 1983 is the codification of the 1871 Civil Rights Act is historical recognition that federal jurisdiction exists where as here state procedural grounds for disregarding federal claims falls below the requirements of due process. The state court at the urging of the City denied the opportunity for consideration of federal claims, and as has and or can be shown from the record was obliged to entertain properly presented federal claims.

Appellant met his basic duty under Washington State practice to present facts, including the absence of notice and opportunity to be heard, in his complaint giving rise to a cause of action. (See Wa Practice CR8(a) and sec. 5101 in Appendix hereto) That the City, at the very least, misled the court to render judgment and or the state courts failed to properly apply the law to facts presented in the complaint is not a consequence the failure of which appellant should be solely forced to bear. Appellant bears the cost of submission by the City of the Minutes of September 14th, and the receipt by and sanction of the Minutes by the state courts. The procedure in the presence of RCW 42.30.060, Seattle Ordinance 105462, and the ByLaws and Procedures for the Ballard Avenue Landmarks Board amounts to a state policy to violate and deprive appellant of his constitutional rights. Appellant, the victim, bears the costs and absorbs the consequential damage, including the substantial and continuing costs of damage mitigation, for actions by the City, Historic Seattle and Judges out of his control, and contrary to their oaths. The bearing of such costs is punishment for using the courts to regress deprivation of basic freedoms. Democracy ceases to exist in the absence of insistence upon the quintessential American ideal of accountability of government



entities and officials to abide by the law. Appellant abides by the law, and expects the City to do the same.

Without a valid underlying judgment *res judicata* can not exist or serve as a bar or an impairment to District Court original jurisdiction to provide a remedy for the constitutional deprivations alleged in the first eleven claims and claim fifteen of the complaint under 42 U.S.C. 1983.

What appellant seeks to accomplish rightfully preserves federal jurisdiction to hear the federal complaint rather than allowing glaring state court misconduct and assumptions of procedural compliance exist where in fact and law required notice and opportunity to be heard did not occur and never existed as evidenced by the record. Appellant seeks to accomplish what Congress intended with passage of 28 U.S.C. 1343, 42 U.S.C. 1983 and 42 U.S.C. 1985.

The Circuit Court Memorandum misconstrues appellant's appeal solely as an attempt to provide other legal theories for recovery and begs the question raised by appellant of lack of jurisdiction in the state court to render the underlying judgment under RCW 42.30.060, resulting in a void underlying judgment, and to which *res judicata* can not be applied.

Substantial First, Fifth and Fourteenth Amendment questions are raised on the record in this case. No constitutional interest of appellant was found to be at stake by the Washington State Appeals Court, which merely brushed aside constitutional claims by finding plaintiff lacked standing to bring his action, that appeal was untimely, and the cause was moot because ratification cured any defect in the prior decision. In lieu of a finding of lack of standing it is difficult to raise and argue state and federal constitutional deprivations alleged in the state complaint. The facts and circumstances involved in the instant case fall below standards set out by this Court and other federal courts in a series of cases, i.e., *Sierra Club v. Morton*, 405 US 727 (1972) and *Scenic Hudson Preservation Conf v. FPC*, 354 F2d 615-6(1965), recognizing a concern for protection of "orderly community planning" to be an affected protected interest. Standing tests are similarly discussed in a series of Washington State court cases, i.e., *Anderson v. Island*

Cy, 501 P2d 594(1972), *Loveless v. Yantis*, 513 P2d 1023(1973), *Byers v. Bd of Challam Cy Comm'ners*, 529 P2d 823(1974), *Save v. Bothell*, 576 P2d 401(1978), and *The Committee For Responsible Planning vs. Kitsap Cy and Winmar Co. Inc.*, King County Superior Court Judgment No. 79-2-01416-8 dated July 24, 1980, in which standing was found in a property owner, like appellant here, who owned property 2¼ miles from the subject property of that case, whereas in the case before this court plaintiff's property is 3 blocks from the subject two houses on the same business street within the Ballard Avenue Landmark District—the zone of interest.

Clearly, appellant was within the zone of interest elsewhere recognized by courts to raise First, Fifth and Fourteenth Amendment constitutional deprivation claims involved in procedural defects in the land use planning process by which action was taken upon the application for a certificate of approval in question at the September 14th board meeting.

Appellant has throughout these proceedings, i.e. detailed discussion appears in the Brief of Appellant before the State of Washington Court of Appeals in the Argument beginning at page 13, raised his contention of his inclusion within the zone of interest required for standing. Have we reached the point where legal standing is solely by corporate name, numbers in a class action or what legal firm's letterhead appears on a complaint? Appellant should not be treated as below the legal standing standard—he is an adversely affected "person" to which constitutional provisions apply.

Appellant will supply in the Appendix a copy of the State Court Appellate Brief referred to above for the Court. In addition, before the lower federal courts appellant urged that he met the standing test in his Request To Reconsider Motion at pages 10 and 11 (See District Court Civil Docket Entry #24).

Why should appellant not be protected in his First Amendment right to be present at the September 14th meeting, observe, hear what others say, and speak? That is what appellant and other signators sought to accomplish by signing, delivery, and receipt of the petition to the Director of the

Seattle Department of Community Development earlier referred to in this Statement. Without required notice of the consideration of the application at the September 14th meeting how could appellant exercise his First and Fifth Amendment rights? Other owners in real property in other historic and special review districts in Seattle or their elected representatives and or boards were lawfully afforded such an opportunity, and those districts turned down siting the houses in those districts prior to the clandestine signing and questioned issuance of a certificate of approval and movement(sic), orchestrated "dumping" of the houses, into the Ballard Avenue Landmark District. Such fact raises Fifth Amendment denial to appellant.

Without notice of action taken or knowledge of such action how could appellant timely appeal the September 14th action? When did the time start running so as to determine beyond which appeal could be brought? Where in the record is that specific date and to what or why does it apply? The state court's timeliness reasoning, applied to the facts in the record, escapes appellant absent required notice to trigger and cut off judicial review otherwise unquestionably within the statute of limitation.

Washington State has imposed its rulings in such a way as to subject appellant to the supreme civil penalty of a court of law—barring the right to proceed, present and prove his complaint at trial. Dismissal was with prejudice. True it may happen everyday, but it must be by valid legal process. Such a circumstance did not here occur. Throughout these proceedings the City has stonewalled the truth as to what happened to cover up its misconduct. Does the City fear what will be presented and proved at trial? Can the City legally stonewall that fear thereby preventing the truth from surfacing in a court of law regarding the City's flagrant and unlawful abuse of power.

Access to and use of the instituting civil suit, appeal and writ proceedings involved in this case raises a substantial question as to whether appellant is required under color of and by the legal process of the State of Washington and or as occurred here subsequently in a federal court to pay a fee in order to exercise his right to speak (See RCW 2.32.070 and Wa

R.A.P. 5.1(b) and 28 U.S.C. 1911, 28 U.S.C. 1913 and 28 U.S.C. 1914). The condition of paying a fee to file a suit, appeal and writ as a condition to exercise a federal constitutional guarantee amounts to a fee as a condition precedent to exercise, express, and or execute guaranteed First Amendment speech, assembly and petition rights for one who like appellant is not a pauper, and is comparable to a poll tax to vote, (See *Harper v. Va. State Bd of Elections*, 86 S Ct 1079(1966)) and additionally may conflict with RCW 42.30.040. Such a situation quells both the opportunity to exercise constitutional rights at the time and moment those rights can have an effect on the lawful operation and conduct of governmental action, and the opportunity for protection of his property under the Fifth Amendment.

Never mind that such filing fees are reimbursable to a successful party. Without paying to file appellant can not exercise his right to speak and protect his property. Unlike the City, appellant, who at this point is not a pauper, can not raise taxes when money is needed to file an appeal, manage and operate his property, incur and continue to incur expense in mitigating damages, have the opportunity to earn a livelihood from the proceeds of his labor and the investment in his property, including furtherance of the objectives of the National Historic Preservation Act of 1966, as amended (PL 89-665, 16 USC 470), embark upon new investment opportunities, and create a reserve to hire an attorney and pay legal expenses. Appellant appears pro se not because of the lack of merits in his claims, but because he can not afford costly legal fees and expenses and assume the consequences of those fees.

Granted that the use to which the filing fee revenue is applied may be for an administrative cost purpose, but the expenditure is none the less a condition to exercise and execute the constitutional guaranteed rights including notice and the opportunity to be heard. Perhaps the solution to the problem appellant calls in question is best resolved simply by the timing of fee requirement and or collection. If money thus expended can not be appropriated elsewhere from another source, then the filing fee should be collected as a consequence of the use of

the judicial system and not as a condition precedent to the free exercise of constitutional guarantees such as the First, Fifth and Fourteenth Amendment rights herein relevant. (See 14 C.J.S. 98) Expediency or greater certainty of collection can not be grounds for substitution of the constitutional guarantee to free access in the first instance to the exercise of constitutional guarantees and protections.

Have we reached the point in 1984 where the only way appellant can or will be allowed to speak in the State of Washington in protection of his constitutional rights before a governmental entity is to first pay the filing fee to perfect the appeal and then get damages for not being able to speak and assemble in the first place when such exercise could have served a useful purpose in furtherance of open government rather than being shut out by a clandestine and closed process? Damages may well be a poor substitute for the guaranteed basic freedom and right to speak and participate before a governmental entity. The victim is or can be punished.

Next appellant contends contrary to the Circuit Court's footnote 2 at page 6 of its Memorandum that the facts involved and mentioned in reasons 1, 2, 3 and 5 of his Motion To Vacate Judgment at pages 1-4 and 6-11 (District Court Civil Docket Entry #19) allege fraud upon the court with particularity. A thing concealed from appellant prior to filing of the memorandum in support of motion for the state summary judgment dismissal was that action was taken as shown from the Minutes of the September 14th meeting regarding the houses. Without notice of the consideration of the certificate of approval application, action there taken was unknown to appellant. What legal effect do the Minutes have when read in conjunction with Seattle Ordinance 105462 and RCW 42.30.060.

From the facts pleaded by appellant and the Motion To Vacate Judgment referred to above, it is not appellant who failed to uncover information (the law of the case, i.e., Ordinance 105462 and RCW 42.30.060), but the courts that failed to diligently uncover information concealed from them by appellees. Fraud was committed upon the court by appellees which prevented the court from applying the law on the books

as enacted (See headnote 4 *Costantini v. TWA* relied upon by the Ninth Circuit in its Memorandum).

This Court's attention is directed to a citation in *Timberlane Lbr. Co. v. Bank of America, N.T. & S.A.*, 549 F2d 597 (1976) from this Court's holding in *Poller v. CBS, Inc.*, 368 US 464, 472 (1962) stating:

Nevertheless, we note that the Supreme Court has expressed disapproval of summary disposition in this type of case:

We believe that summary procedures should be used sparingly in complex antitrust litigation where motives and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice".

An analogy can easily be drawn and is reasonable and relevant between the facts and circumstances involved in the warning given in the *Poller* case and the type of case before this Court and the impropriety of summary judgment dismissal where the party alleged to be the wrongdoer may possess information the full knowledge of which can only be drawn out under oath with its judicial sanctions of witnesses including government officials on the witness stand. Summary judgment dismissal here prevented the opportunity for and use of the legitimate and elsewhere recognized technique and tactic—witnesses on the trial stand, which may best bring out and arrive at the truth from those involved in the conspiracy to deprive appellant of his constitutional rights regarding the scheme to move the houses into the district. Appellant continues to maintain, as he has on the record, that summary judgment dismissal was improper, and contrary to the generally accepted practice for the proper and rightful imposition of summary dismissal (See Washington Practice CR 56 Rules For Superior Court "1. Purpose and Application" and "8. Questions of Credibility" as authority for impropriety—reproduced in Appendix of this Petition).

In *Parkland Hosiery v. Shore*, 439 US 322(1979) at page 328, and cited at page 7 of the appellant's Motion For Relief (District Court Civil Docket Entry #19), is language demonstrative of the function and role of a federal court in the instant case. The court in the Parkland case at page 328 quotes an earlier United States Supreme Court which stated

"Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard".

By this petition appellant seeks to put this Court on notice of the circumstances herein present so that it can perform its intended role as a guardian. It is not too late in 1984 for this Court to safeguard the techniques and tactics of trial practice in the presentation and proof of claims herein, and thereby safeguard the operation of government under law, not in disregard of law.

Appellant contends that this case is the civil equivalent of *Thompson v. City of Louisville*, 362 US 199, in that dismissal of the claims in question from the foregoing turns not on the sufficiency of the evidence, but on whether this dismissal rests upon any admissible evidence at all. The dismissals are totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clauses of the Fifth and Fourteenth Amendments (See *Garner v. Louisiana*, 368 US 157, 163). Appellant raises the point and intends to urge it if certiorari be granted.

From the record, the propriety and prejudice caused by raising a counterclaim that plaintiff's claims "are patently frivolous, vexatious, and constitute a willful and malicious abuse of process by plaintiff Frank Kustina", the questions of fraud upon the court in obtaining the underlying judgment, the existence of a full and fair opportunity to litigate, and the proper use of summary judgment dismissal procedures below in both the state and federal courts along with the other questions presented herein are special and important reasons for this Court to grant a review on writ of certiorari.

Respectfully submitted,

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